No. 18-2419

In the United States Court of Appeals
for the Third Circuit

IN RE NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

OPENING BRIEF OF APPELLANTS ARMSTRONG OBJECTORS

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INTRODUCTION

Approximately $63.65 million of improvements were made to the class action settlement directly resulting from the Armstrong Objectors'[1] objections and appeals regarding uncapping the BAP Fund, expanding the CTE with Death benefits eligibility period, and eliminating the appeal fee on a showing financial hardship. The district court, however, erroneously denied Armstrong Objectors' Counsels'[2] reasonable fee request—while, at the same time, awarding attorneys' fees to the

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[1] The Armstrong Objectors are composed of Raymond Armstrong, Larry Barnes, Larry Brown, Drew Coleman, Kenneth Davis, Dennis DeVaughn, William B. Duff, Kelvin Mack Edwards, Sr., Phillip E. Epps, Gregory Evans, Charles L. Haley, Sr., Alvin Harper, Mary Hughes, James Garth Jax, Ernest Jones, Michael Kiselak, Dwayne Levels, Darryl Gerard Lewis, Gary Wayne Lewis, Jeremy Loyd, Lorenzo Lynch, Michael McGruder, Tim McKyer, David Mims, Nathaniel Newton, Jr., Clifton L. Odom, Evan Ogelsby, Solomon Page, Hurles Scales, Jr., Barbara Scheer, Kevin Rey Smith, Willie T. Taylor, George Teague, and Curtis Bernard Wilson.

The Armstrong Objectors are thirty-four former NFL players and family members of players with distinguished playing careers. The Armstrong Objectors collectively played an average of over six seasons with over twenty different teams. They include offensive and defensive linemen, linebackers, defensive backs, wide receivers, tight ends and a running back. The Armstrong Objectors include All-Americans, Pro Bowl selections, Super Bowl champions, and a Super Bowl MVP. The oldest Armstrong Objector began his NFL career in 1946. The youngest Armstrong Objector retired after the 2011 season. One played on five Super Bowl Championship teams, three played on three Super Bowl Championship teams, one played on one Super Bowl Championship team, and one played in NFL Europe. The Armstrong Objector group was the second largest objector group.

[2] Armstrong Objectors' Counsel consist of the Coffman Law Firm, Weller, Green, Toups & Terrell, LLP, the Warner Law Firm, and the Webster Law Firm.

Faneca Objectors for making these very same objections over a month *after* the Armstrong Objectors made them. Armstrong Objectors' Counsel respectfully assert that they are entitled to attorneys' fees for making such objections directly resulting in improvements to the class action settlement—especially if Faneca Objectors' counsel are entitled to such fees.[3]

The Armstrong Objectors also provided value to the Class Members in the form of the Collateral Time Benefit (as explained in detail below), the benefit of their adversarial challenge to the overall fairness of the class action settlement, and the improved record they delivered—for which Armstrong Objectors' Counsel also should be compensated. In erroneously denying Armstrong Objectors' Counsel's reasonable fee request, however, the district court failed to consider—much less, reference—this additional value to Class Members secured by the Armstrong Objectors in its Fee Allocation Order. JA84.

That said, Armstrong Objectors' Counsel only seek an award of their straight time hourly fees ($599,700) with no multiplier and no expense reimbursement.

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[3] By this appeal, the Armstrong Objectors specifically do not take issue with the attorneys' fees awarded (or not awarded) by the district court to Faneca Objectors' counsel. The Armstrong Objectors also do not appeal the aggregate fee award, Class Counsel's fee award, or individually represented plaintiffs' counsel's fee awards.

JURISDICTIONAL STATEMENT

The district court had original jurisdiction over this matter pursuant to 28 U.S.C. §§ 1332(d). This Brief addresses the district court's failure to award attorneys' fees to Armstrong Objectors' Counsel in the district court's May 24, 2018 order allocating common-benefit attorneys' fees (the "Fee Allocation Order"). Joint Appendix[4] 84. This ruling is a final collateral order subject to immediate appeal over which this Court has appellate jurisdiction under 28 U.S.C. § 1291. *See Interfaith Community Org. v. Honeywell Intern., Inc.*, 426 F.3d 694, 702–03 (3d Cir. 2005). Armstrong Objectors' Counsel timely filed their notice of appeal. JA27.

STATEMENT REGARDING STANDING TO APPEAL

In their notice of appeal (JA27), the Armstrong Objectors appealed the district court's April 5, 2018 memorandum and order (JA48 and JA68, respectively) awarding the aggregate common-benefit attorneys' fees, as well as the May 24, 2018 Fee Allocation Order. JA84.

On July 24, 2018, in this appeal, Class Counsel (Appellees) filed a motion for coordinated briefing of related appeals and to partially dismiss certain appeals for lack of standing, including this appeal. Class Counsel argue that Armstrong Objectors' Counsel "are not colorably aggrieved" by the April 5, 2018 order awarding the aggregate common-benefit attorneys' fees (*id.* at 3) and, therefore,

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[4] The Joint Appendix hereafter will be referenced as "JA____."

"should be limited to addressing only those issues that relate to the May 24, 2018 [Fee] Allocation Order." *Id.* at 18.

In its February 7, 2019 order in this appeal, this Court declined to address Class Counsel's motion to partially dismiss this appeal, directing Armstrong Objectors' Counsel to articulate in this Brief the basis for their standing to challenge the orders appealed and whether they preserved the right to do so. *Id.* at 1-2. This is Armstrong Objectors' Counsels' statement in response to the Court's directive.

As stated in their August 3, 2018 response to Class Counsel's motion to partially dismiss this appeal, Armstrong Objectors' Counsel appeal the district court's May 24, 2018 Fee Allocation Order (JA84) because of the district court's failure to award them any attorneys' fees for improvements made to the class action settlement directly resulting from the Armstrong Objectors' objections. As confirmed in their August 3, 2018 response to Class Counsel's motion to partially dismiss this appeal, the Armstrong Objectors did not object to Class Counsel's common-benefit attorneys' fee petition and, therefore, do not directly appeal the district court's April 5, 2018 aggregate common-benefit attorneys' fee award. JA68. The aggregate common-benefit fee award order is referenced in the Armstrong Objectors' notice of appeal (JA27) for the sole reason that the district court's May 24, 2018 Fee Allocation Order flows from it.

Accordingly, Armstrong Objectors' Counsel limit this appeal only to the district court's failure to award them attorneys' fees in its May 24, 2018 Fee Allocation Order. Nor do Class Counsel dispute that Armstrong Objectors' Counsel properly preserved their right to challenge the Fee Allocation Order. *See, e.g.,* Class Counsel' July 24, 2018 motion for coordinated briefing of related appeals and to partially dismiss certain appeals at 18 (The "Armstrong Objectors … should be limited to addressing only those issues that relate to the May 24, 2018 [Fee] Allocation Order.").

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Did the district court commit legal error by denying Armstrong Objectors' Counsel's reasonable fee request for improvements made to the class action settlement directly resulting from their objections pertaining to uncapping the BAP Fund, expanding the CTE with Death benefits eligibility period, and eliminating the appeal fee on a showing financial hardship—while, at the same time, awarding attorneys' fees to the Faneca Objectors for making these very same objections over a month *after* the Armstrong Objectors made them? *See* Armstrong Objectors' September 3, 2014 Objection (JA4112), Armstrong Objectors' Counsel's Fee Petition and Memorandum of Law (with Declarations) (JA6951 and JA 6957), and the district court's May 24, 2018 Fee Allocation Order (JA84).

Did the district court commit legal error by failing to award attorneys' fees to Armstrong Objectors' Counsel for the value of the Collateral Time Benefit created by their appeals, the value of the benefit of the adversarial challenge they brought to the overall fairness of the class action settlement, and the improved record they delivered? *See* Armstrong Objectors' September 3, 2014 Objection (JA4112), Armstrong Objectors' Counsel's Fee Petition and Memorandum of Law (with Declarations) (JA6951 and JA 6957), and the district court's May 24, 2018 Fee Allocation Order (JA84).

STATEMENT OF RELATED CASES AND PROCEEDINGS

Armstrong Objector's Counsel's appeal of the district court's failure to award them attorneys' fees for improvements made to the class action settlement directly resulting from their objections has not been previously before this Court. Armstrong Objector's Counsel is aware of several other attorneys' fee appeals arising out of the *National Football League Players' Concussion Injury Litigation*. Pursuant to the Court's October 18, 2018 order and February 27, 2019 order, all such appeals—including this appeal—were consolidated; to wit: Nos. 18-2012, 18-2225, 18-2249, 18-2253, 18-2281, 18-2332, 18-2416, 18-2417, 18-2418, 18-2419, 18-2422, 18-2650, 18-2651, 18-2661, 8-2724, and 19-1385.

STANDARD OF REVIEW

"The standards employed calculating attorneys' fees awards are legal questions subject to plenary review, but the amount of a fee award is within the district court's discretion so long as it employs correct standards and procedures and makes findings of fact not clearly erroneous." *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 496 (3d Cir. 2017) (citing *In re Rite Aid Corp. Securities Litig.*, 396 F.3d 294, 299 (3d Cir. 2005)). An abuse of discretion "can occur 'if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous.' " *Zolfo, Cooper & Co. v. Sunbeam–Oster Co.*, 50 F.3d 253, 257 (3d Cir.1995) (quoting *Electro–Wire Prods., Inc. v. Sirote & Permutt, P.C. (In re Prince)*, 40 F.3d 356, 359 (11th Cir.1994)).

Here, the district court established the standards and procedures for filing objections to the class action settlement, but did not adhere to them, thereby erroneously allowing the Faneca Objectors to take credit for suggesting improvements ultimately made to the settlement—to wit, uncapping the BAP Fund, expanding the CTE with Death benefits eligibility period, and eliminating the appeal fee on a showing financial hardship—that were suggested by the Armstrong Objectors in their Objection (JA4112) over a month *before* the Faneca Objectors filed their objection.

In denying Armstrong Objector's Counsel's attorneys' fee request, the district court failed to follow its own standards and procedures and failed to follow the legal standards for awarding attorneys' fees to objectors' counsel—thereby committing legal error—even though Armstrong Objector's Counsel's provided a detailed timeline of the filing of their Objection vis-à-vis the filing of the Faneca Objectors' objection and a detailed explanation of the value they secured for Class Members via their objections in Armstrong Objector's Counsel's fee petition and supporting memorandum of law. JA6951 and JA6957. In denying Armstrong Objector's Counsel's attorneys' fee request, the district court also failed to consider—much less, reference in its Fee Allocation Order (JA84)—additional standards and procedures for awarding attorneys' fees to objectors, pursuant to which Armstrong Objector's Counsel should be compensated; to wit, the value of the Collateral Time Benefit, the benefit of the adversarial challenge to the overall fairness of the Revised Settlement and Final Settlement, and the improved record delivered by Armstrong Objector's Counsel via their objections and appeals.

STATEMENT OF THE CASE

I. A brief procedural history of the underlying class action.

A. The Initial Settlement was rejected by the district court *sua sponte*—giving rise to the Revised Settlement.

In 2011, several retired NFL players and their families sued the NFL, alleging that the NFL misled them about the risks of repeated multiple traumatic brain injury

("MTBI"), and that the NFL breached its duty to protect players' health and safety. The cases were consolidated in the district court.

The NFL moved to dismiss the cases on preemption grounds. While the NFL's motion was pending, the Court ordered the Parties to mediation. In August 2013, Class Counsel and the NFL reached a class-wide settlement (the "Initial Settlement"), which Class Counsel moved the district court to preliminarily approve. JA966.

The Initial Settlement created a Monetary Award Fund ("MAF"), capped at $675 million, to compensate retired players diagnosed with one of five specific Qualifying Diagnoses. JA1004-JA1097. But despite the numerous diseases and symptoms linked to MTBI alleged in the putative class action complaint, the MAF in the Initial Settlement provided awards only for diagnoses of Parkinson's disease, Alzheimer's disease, ALS, and sufficiently severe dementia ("Level 1.5" and "Level 2" neurocognitive impairment). *Id.*

The Initial Settlement also did not provide for an ongoing award for chronic traumatic encephalopathy ("CTE")—even though CTE was the disease at the heart of the litigation. *Id.* Instead, the Initial Settlement provided "Death with CTE" benefits only for players who died and received a post-mortem diagnosis of CTE *before* the Initial Settlement preliminary approval date. *Id.*

The Initial Settlement also applied several criteria to determine each claimant's award, including a maximum award for each Qualifying Diagnosis,

subject to being reduced depending on the player's age and the number of seasons played in the NFL (with at least five "eligible seasons" being required for a full award). *Id.* But the Initial Settlement "specifically excluded" seasons played in NFL Europe (or the NFL's other European leagues) from eligible-season credit, even though it fully released players' claims for injuries suffered while playing in NFL Europe. *Id.* The Initial Settlement also reduced awards by 75% for players who suffered a single stroke, or a single instance of traumatic brain injury not related to NFL play and imposed a $1,000 fee on Class Members who appealed adverse determinations of their MAF claims. *Id.*

The Initial Settlement also created a Baseline Assessment Program ("BAP") Fund (capped at $75 million), which provided players with an examination to establish a baseline of each player's neurocognitive functioning. But not every Class Member was entitled to such an examination. *Id.* Only Class Members with at least half of an eligible season could participate in the BAP. *Id.* The BAP examination also would screen players for dementia or neurocognitive impairment. *Id.* Players diagnosed with "Level 1" neurocognitive impairment by the examination could receive "supplemental benefits" to cover the cost of treatment. *Id.*

Slightly over a week after Class Counsel filed their motion for preliminary approval of the Initial Settlement, the district court *sua sponte* denied the motion. *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708,

716 (E.D. Pa. 2014). Noting its "duty to protect the rights of all potential class members" (*id.* at 710), the district court declined to preliminarily approve the Initial Settlement because the MAF lacked "the necessary funds to pay Monetary Awards for Qualifying Diagnoses." *Id.* at 715.

Six months later, on June 25, 2014, Class Counsel submitted a Revised Settlement (JA2151) for preliminary approval. The Revised Settlement addressed the district court's concerns by eliminating the $675 million cap on the MAF. *Id.* The Revised Settlement also retained, among other things, the $75 million cap on the BAP Fund, continued to deny any credit for seasons played in NFL Europe, and retained the 75% reductions for stroke or non-NFL TBI. On July 7, 2014, the district court preliminarily approved the Revised Settlement. *Id.*

B. The Armstrong Objectors filed their Objection, Amended Objection, and Supplemental Objection suggesting improvements to the Revised Settlement.

Unlike other objectors who sought to intervene in the underlying class action, opposed preliminary approval of the Revised Settlement, and appealed preliminary approval of the Revised Settlement, the Armstrong Objectors played by the rules and filed their Objection to the Revised Settlement (JA4112) per the standards and procedures established by the district court in its preliminary approval order. JA2121.

Paragraph 4(h) of the preliminary approval order (JA2127), which established October 14, 2014 as the deadline to object to the Revised Settlement, further stated

that the attached Long Form Notice "explains the objection procedure." *Id. See* FAQ No. 35 in the Long Form Notice (JA2147) (requiring objections to be mailed directly to the Clerk of the Court for the Eastern District of Pennsylvania and postmarked on or before October 14, 2014).

So, on September 3, 2014, *more than a month before the objection deadline*, over a month *before* the Faneca Objectors filed their objection (on October 14, 2014), and *before* any other objections were *filed* on the district court's ECF (in contravention of the district court's established procedure), the Armstrong Objectors followed the rules and mailed their Objection (JA4112) directly to the Clerk of the Court. After other objectors failed to follow the district court's procedure and began filing objections on the district court's ECF, the Clerk, on November 4, 2014, filed the Armstrong Objectors' Objection on the ECF as No. 6353.

Later, on October 13, 2014, after additional former NFL players joined the Armstrong Objector group, and again pursuant to the procedure established by the district court in the Long Form Notice, the Armstrong Objectors overnighted their Amended Objection (JA3971) directly to the Clerk of the Court. The Clerk, on October 14, 2014, also filed their Amended Objection on the ECF as No. 6233. Thereafter, on April 13, 2015, after the district court allowed objections to be filed on the ECF, the Armstrong Objectors filed a Supplemental Objection. JA6124.

In their comprehensive September 3, 2014 Objection (JA4112), the Armstrong Objectors articulated thirteen detailed, multi-part objections to the Revised Settlement, as well as concrete proposals for curing the defects—including, among others, opening up the BAP, extending the Death with CTE benefits eligibility period, and eliminating the $1,000 appeal fee. *Id.* Again, the Armstrong Objectors' Objection was filed over a month *before* the Faneca Objectors filed their objection on October 14, 2014. JA3003.

C. The district court approved the Final Settlement after Class Counsel and the NFL made improvements to the Revised Settlement proposed by the Armstrong Objectors.

1. After the Armstrong Objectors filed their objections, and after the Revised Settlement final fairness hearing, but before it was approved, the district court suggested that Class Counsel and the NFL make several improvements to the settlement previously proposed by the Armstrong Objectors.

After the November 19, 2014 final fairness hearing on the Revised Settlement (JA2151), the district court, on February 2, 2015, issued an order suggesting that Class Counsel and the NFL make five specific improvements to the Revised Settlement that, in the district court's view, would "enhance the fairness, reasonableness, and adequacy of" the Revised Settlement. JA5839.

Among other things, the district court opined that the "settlement should assure that all living Retired NFL Football Players who timely register for the Settlement" receive a BAP baseline examination. *Id.* The district court also urged

that the "Qualifying Diagnosis of Death with CTE" should include players who die between the dates of preliminary approval and final approval, thereby extending the eligibility period. *Id.* And the district court recommended that the Revised Settlement provide a hardship provision under which the $1000 appeal fee could be waived. *Id.* Each of these suggestions addressed defects in the Revised Settlement rooted in the objections first lodged in the Armstrong Objectors' Objection. JA4112.

2. Class Counsel and the NFL made the district court's suggested improvements to the Revised Settlement first proposed by the Armstrong Objectors. The resulting Final Settlement was approved.

On February 13, 2015, Class Counsel and the NFL submitted a Final Settlement to the district court for approval containing provisions addressing each of the suggestions in the district court's February 2, 2015 order. *See* proposed Final Settlement (which became the Final Settlement) (JA5853-JA6014). These improvements were first proposed by the Armstrong Objectors in their Objection. JA4112. The Final Settlement was finally approved on April 22, 2015. JA6131-JA6279.

Among other things, the Final Settlement ensured that every retired NFL player eligible to receive a BAP examination would receive one. JA5853-JA6014. It also extended eligibility for Death with CTE benefits to players who died before the final approval date (April 22, 2015), rather than those who died before the

preliminary approval date (July 7, 2014)—a nine month *plus* extension. *Id.* And it incorporated the appeal fee waiver hardship provision. *Id.*

D. The Armstrong Objectors' Third Circuit and Supreme Court Appeals.

Notwithstanding the above improvements to the class action settlement, in the Armstrong Objectors' opinion, more improvements needed to be made. Other objectors agreed. So, in May 2015, twelve groups of objectors (a total of 93 appellants)—led by the Armstrong Objectors—appealed the district court's order approving the Final Settlement. *In re National Football League Players Concussion Litigation*; No. 15-2272 (3d Cir).

On appeal, the Armstrong Objectors (i) argued that the Final Settlement's substance (terms) and procedure (structure of the negotiations) improperly resulted in Death with CTE benefits being awarded to present claimants at the expense of future claimants (*i.e.*, the disparate treatment between former players diagnosed with CTE before final approval, and those diagnosed after final approval), (ii) argued that the Parties' attempt to delay scrutiny of attorneys' fees until after final approval was a denial of due process, and (iii) offered several solutions to the Final Settlement's structural defects, including appointing independent counsel, excluding future CTE claims from the release, compensating CTE with evolving diagnostic criteria, and providing back-end opt-out rights to protect future claimants. *See* Armstrong Objectors' Corrected Appellate Brief (filed Sept. 14, 2015 in this Court).

Noted appellate advocate, Deepak Gupta ("Gupta"), of Gupta Wessler, PLLC in Washington, D.C., one of Armstrong Objectors' Counsel, took the lead on the appeals, organizing counsel for 87 of the 93 appellants. *See* Joint Proposal of Appellants Regarding Oral Argument (filed Oct. 29, 2015 in this Court) (noting that "[t]he Faneca Objectors (representing 4 of the 93 objectors) have indicated that they do not consent to our proposal, but have not provided a counterproposal.").

When this Court rejected the Joint Proposal, Gupta again organized appellants' counsel, submitting a Revised Joint Proposal on Division of Argument Time on November 13, 2015. The Faneca Objectors joined the revised joint proposal. *Id.*

Gupta took the lead at the November 19, 2015 oral argument, addressing the inadequate representation of future injury claimants in the Final Settlement, addressing the attorneys' fee deferral issue, and handling a portion of the rebuttal. *See* Transcript of the November 19, 2015 Third Circuit oral argument in Case No. 15-2272 at 29:20-52:13; 114:1-124:9. Indeed, the Court was most interested in the topics presented by Gupta as he spoke longer than any other appellant's lawyer. *Id.*

On April 18, 2016 (amended May 2, 2016), this Court, in a 70-page opinion, affirmed the district court's order granting final approval of the Final Settlement. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016). But even though as a direct result of the Armstrong Objectors' efforts,

the Final Settlement was improved substantially and its fairness tested, their job was not yet finished.

When others gave up, the Armstrong Objectors pressed on. Staunchly believing in their position that additional settlement improvements were needed, they filed a petition for writ of *certiorari* with the United States Supreme Court. Case No. 16—413. Although the Supreme Court ultimately denied their petition (at 137 S.Ct. 607 (Dec. 12, 2016)), the Armstrong Objectors never gave up fighting to improve the Final Settlement, securing for the Class Members the critical Collateral Time Benefit (as described below) in the process.

II. Notwithstanding the improvements to the Final Settlement directly resulting from the Armstrong Objectors' objections, which were submitted *before* the Faneca Objectors' objections, the district awarded $350,000 of attorneys' fees to Faneca Objectors' counsel, but zero attorneys' fees to Armstrong Objectors' Counsel.

A. A brief procedural history of the fee petitions.

After the appeals of the underlying settlement concluded, the district court turned its attention to the award and allocation of attorneys' fees and expenses. On March 1, 2017, the Armstrong Objectors filed their Fee Petition (JA6951) and supporting memorandum of law (with declarations) (JA6957). Thereafter, Class Counsel opposed Armstrong Objectors' Counsel's Fee Petition as part of Class Counsel's omnibus response brief (JA7308). Armstrong Objectors' Counsel subsequently filed a Fee Petition reply brief (JA7820).

Thereafter, in its September 12, 2017 order (JA7920), the district court directed Class Counsel, Christopher A. Seeger, to "submit a detailed submission as a proposal for the allocation of lawyers' fees among class counsel including the precise amounts to be awarded along with a justification of those amounts based on an analysis of the work performed." Mr. Seeger subsequently filed his proposed attorneys' fee allocation. JA7943.

Notwithstanding the district court's order, however, Mr. Seeger did not address or analyze (much less, reference) Armstrong Objectors' Counsel's Fee Petition—effectively proposing that they receive nothing.[5] *Id.* Armstrong Objectors' Counsel filed a response to Mr. Seeger's proposed attorneys' fee allocation (JA7992), objecting to it as incomplete and violating the district court's September 12, 2017 order.

On April 5, 2018, the district court issued its aggregate common-benefit attorneys' fee order and opinion (JA48 and JA68), collectively awarding $106.8 million of attorneys' fees. Thereafter, on May 24, 2018, the district court issued its Fee Allocation Order (JA84), awarding zero attorneys' fees to Armstrong Objectors' Counsel and $350,000 of attorneys' fees to Faneca Objectors' counsel. *Id.* In doing

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[5] Mr. Seeger proposed that Faneca Objectors' counsel be awarded $150,000 for their work. *See* JA7943 at 13-14. Faneca Objectors' counsel sought $20 million of fees and expenses in its fee petition. JA106. Armstrong Objectors' Counsel, on the other hand, only sought (and now seek) an award of their straight time hourly fees ($599,700) with no multiplier and no expense reimbursement.

so, the district court denied Armstrong Objectors' Counsel's Fee Petition across the board, erroneously holding that the "Armstrong Objectors cannot receive credit for parroting the same objections that were made more persuasively by the Faneca Objectors." JA106. But as set forth above and below, the Armstrong Objectors parroted nothing. If anything, the Faneca Objectors parroted them. Nor did the district court consider the value of the Collateral Time Benefit, the benefit of the adversarial challenge to the overall fairness of the Revised Settlement and Final Settlement, and the improved record Armstrong Objectors' Counsel delivered.

B. Armstrong Objectors' Counsel's reasonable fee request.

Armstrong Objectors' Counsel are experienced, creative, hardworking lawyers with national practices who are battle tested in class action litigation. *See* JA6993; JA6999; JA7005; JA7010. But unlike other objectors' counsel, the Armstrong Objectors' ran a lean attorney team, stayed focused, played by the district court's procedural rules, did not make unnecessary filings, and advanced the Armstrong Objectors' objections and interests of the Class Members in an efficient and effective manner. Armstrong Objectors' Counsel's vigorous advocacy "sharpen[ed] the issues and debate on the fairness of the settlement." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 358 (N.D. Ga. 1993) (awarding objector fees). Their efforts secured additional benefits to Class Members fairly valued up to $63.65 million (not including the value of the Collateral Time Benefit, the benefit of

the adversarial challenge to the overall fairness of the Revised Settlement and Final Settlement, and the improved record Armstrong Objectors' Counsel delivered).

Armstrong Objectors' Counsel spent 1179.75 hours and advanced over $70,000 of out-of-pocket expenses working on behalf of all Class Members:

Law Firm	Total Hours	Fees	Expenses	JA Reference
The Coffman Law Firm	411.50	$233,630.00	$32,031.40	JA6992
Weller, Green, Toups & Terrell, LLP	328.00	$236,600.00	$38,346.83	JA6998
The Warner Law Firm	177.75	$52,009.80	-	JA7009
The Webster Law Firm	262.50	$77,460.00	-	JA7007
Total	**1179.75**	**$599,699.80**	**$70,378.23**	-

Armstrong Objectors Counsel only sought (and now seek) an award of their straight time hourly fees ($599,700) with no multiplier and no expense reimbursement.

Armstrong Objectors' Counsel's requested fee award is fair and reasonable. It is but .049% of the overall $1.227 billion value of the Final Settlement (assuming a Final Settlement value of $1.163 billion per Class Counsel (*e.g.*, JA6602) plus the $63.65 million increase secured by Armstrong Objectors' Counsel's efforts discussed below). Armstrong Objectors' Counsel's requested fee award is but .942% of the $63.65 million increase in the value of the Final Settlement, and .533% of the $112.5 million of attorneys' fees to be paid by the NFL. Should Armstrong Objectors' Counsel's fee request be granted, Class Counsel will still receive $100+

million in attorneys' fees in a case in which there was no discovery, no contested class certification hearing, no summary judgment practice, and no trial.

SUMMARY OF THE ARGUMENT

Approximately $63.65 million of improvements were made to the class action settlement directly resulting from the Armstrong Objectors' objections and appeals regarding uncapping the BAP Fund, expanding the CTE with Death benefits eligibility period, and eliminating the appeal fee on a showing financial hardship. The district court, however, erroneously denied Armstrong Objectors' Counsel's reasonable fee request—while, at the same time, awarding attorneys' fees to the Faneca Objectors for making these very same objections over a month *after* the Armstrong Objectors made them. Armstrong Objectors' Counsel respectfully assert that they are entitled to attorneys' fees for making such objections directly resulting in improvements to the class action settlement—especially if Faneca Objectors' counsel are entitled to such fees.

The Armstrong Objectors also provided value to the Class Members in the form of the Collateral Time Benefit, the benefit of the adversarial challenge to the overall fairness of the Revised Settlement and Final Settlement, and the improved record they delivered—for which Armstrong Objectors' Counsel also should be compensated. In erroneously denying Armstrong Objectors' Counsel's reasonable fee request, however, the district court failed to consider—much less, reference—

this additional value to Class Members secured by Armstrong Objectors' Counsel in its Fee Allocation Order. JA84.

ARGUMENT

I. The Armstrong Objectors increased the value of the class action settlement and delivered other benefits to the Class Members.

The improvements to the Revised Settlement that became the Final Settlement directly resulting from the Armstrong Objectors' efforts can be fairly valued at up to $63.65 million. Based on the Armstrong Objectors' objections, every eligible Class Member will receive a BAP examination, the Death with CTE benefits eligibility period was expanded, and the $1,000 appeal fee was waived in cases of financial hardship. Class Members will benefit enormously from these settlement enhancements. But there's more. The Armstrong Objectors' also provided Class Members with the Collateral Time Benefit, the benefit of the adversarial challenge to the overall fairness of the Revised Settlement and Final Settlement, and the benefit of the improved record.

A. The Armstrong Objectors' efforts resulted in guaranteed BAP examinations for all eligible Class Members.

In their September 3, 2014 Objection to the Revised Settlement (JA4112), the Armstrong Objectors objected to the BAP Fund as then structured (JA4121-4122), and proposed that the Revised Settlement:

> [B]e revised to extend the deadlines for registering for, and taking, the baseline exams for two years, and extend the life of the BAP beyond

> ten years to possibly twenty years, which could be funded by, *inter alia*, (i) eliminating and utilizing some of the $112.5 million allocated to Co-Lead Class Counsel as additional attorneys' fees (*see* below), (ii) eliminating the 5% set aside (*see* below), (iii) eliminating and utilizing the $10 million allocated to the up-front *cy pres* Education Fund (see below), and/or (iv) additional funds from the NFL.

JA4122. Extending the BAP deadlines and life would effectively uncap the BAP Fund as additional funds would be necessary to fund the extensions.

As a direct result of the Armstrong Objectors' Objection, which was filed before the Faneca Objectors' objection, the Final Settlement entitles many former NFL players to receive a BAP baseline examination—evaluating their health and charting a course of treatment—who otherwise would not have received one under the Revised Settlement. The quality of life benefits to these former players and their families is extraordinary—and can be fairly valued.

The Revised Settlement capped the BAP Fund at $75 million. (JA2235; § 23.3(d)). Under the Final Settlement, however, every eligible Class Member will receive a BAP examination due to the Armstrong Objectors' efforts. JA5935-41; §§ 23.1(b), 23.3(d)). The NFL's actuary estimated that $27 million in supplemental benefits would be paid from the BAP Fund. JA2468 ¶ 54. Separately, the total cost of baseline examinations—each worth $3500 (JA4452 ¶ 24)—for the 16,962 living Class Members eligible for an examination could reach $59.4 million (*i.e.*, 16,962 eligible Class Members times $3500). *See* JA2336 at 18 (Table 4-3); JA4452 ¶ 24. The total cost of these two benefits exceeds the original $75-million cap by $11.4

million. Thanks to the Armstrong Objectors' Objection, eliminating the BAP cap could yield an additional benefit to Class Members of up to $11.4 million.

B. The Armstrong Objectors' efforts also resulted in an expanded eligibility period for Death with CTE benefits.

In their September 3, 2014 Objection to the Revised Settlement (JA4112), the Armstrong Objectors objected to the Death with CTE Benefits as then structured because such benefits required "retirees to have died and been diagnosed with CTE *prior to* July 7, 2014" (the settlement preliminary approval date). JA4119 (emphasis added). Thus, the Armstrong Objectors' Objection continued, "if an NFL retiree dies after July 7, 2014, and regardless of whether the player commits suicide and it is ultimately determined he suffered from CTE, his family will not qualify for an award." *Id.* "there should not be any deadlines based on when death occurred." *Id.*

The Armstrong Objectors also objected to the Death with CTE Benefits provision in the Revised Settlement because it ignored "that CTE—a condition found in contact sport athletes, military personnel exposed to explosive blasts, and others subjected to repetitive concussive and sub-concussive head trauma, marked by widespread, irreversible accumulation of destructive tau protein in the brain—is at the heart of this litigation. What's more, the [Revised Settlement] does not assign similar cutoff dates to former players diagnosed with ALS, Alzheimer's or Parkinson's—even though a 2013 National Institute for Occupational Safety and Health study of nearly 3,500 NFL retirees who played at least five seasons between

1959 and 1988 recorded just 17 combined cases of these diseases while, in a 2010 study, 33 of the 34 studied deceased NFL players were diagnosed with CTE." *Id.*, JA4119-JA4120.

As a direct result of the Armstrong Objectors' Objection, which was filed *before* the Faneca Objectors' objection, the Final Settlement offered Death with CTE Benefits to more Class Members who suffered CTE by expanding the eligibility period for Death with CTE benefits. Under the Revised Settlement, Class Members who died and were diagnosed with CTE post-mortem after the preliminary approval date would have received nothing. JA2151 Ex. B-1 ¶ 5. Thanks to the Armstrong Objectors' efforts, the Final Settlement extended the time frame for securing a Death with CTE Qualifying Diagnosis—which carries up to a $4 million award—by over nine months (*i.e.*, from July 7, 2014 to April 22, 2015). JA5853 Ex. B-1 ¶ 5.

This settlement benefit also can be fairly valued. Between July 7, 2014 and April 22, 2015, 111 Class Members passed away.[6] According to recent Boston University research, CTE was present in the brains of 96% of all deceased NFL players whose brains were examined in an autopsy.[7] Of these 111 deceased Class

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[6] *See Oldest Living Pro Football Players, 2016-2010 Pro Football Necrology List,* http://www.oldestlivingprofootball.com.htm (previously visited on Feb. 18, 2017; website no longer available).

[7] Jason M. Breslow, *New: 87 Deceased NFL Players Test Positive for Brain Disease*, FRONTLINE, http://www.pbs.org/wgbh/frontline/ article/new-87-deceased-nfl-players-test-positive-for-brain-disease/(last visited Sept. 1, 2019).

Members, 106 can be reasonably expected to have CTE and qualify for Death with CTE benefits in an average amount of approximately $421,000 (accounting for their age at death and number of eligible seasons per player data on NFL.com). Thus, due to the Armstrong Objectors' Objection, the value of the Final Settlement was increased by up to $44.6 million (*i.e.*, $421,000 *times* 106 deceased Class Members who can be reasonably expected to have CTE).

C. The Armstrong Objectors' efforts also resulted in the $1,000 appeal fee being waived for good cause.

To receive a monetary award under the Final Settlement, Class Members must submit a Claim Package to the Claims Administrator, who may approve or deny the claim. JA5853 § 9.3. When a claim is denied, the Class Member may appeal to the Court (in consultation with the Appeals Advisory Panel and/or Appeals Advisory Panel Consultant). *Id.* § 9.8. But to do so, the Class Member must first pay a $1,000 appeal fee that will be refunded only if the appeal is successful. *Id.* § 9.6(a).

The Revised Settlement required the appeal fee to be paid regardless of a Class Member's financial circumstances. JA2151 § 9.6(a). Thanks to the Armstrong Objectors' Objection proposing to eliminate the appeal fee altogether (JA4123-24), under the Final Settlement, the appeal fee will be waived "for good cause" (JA5853 § 9.6(a)(i))—thereby paving the way for denied claims to be appealed that otherwise would not be appealed and adding significant settlement value.

This settlement benefit also can be fairly valued. In the NFL's disability-claims process, approximately 16.2% of all claims paid are initially denied, but ultimately paid after appeal.[8] Class Counsel's actuary calculated that 3596 Class Members will be entitled to receive an award under the Final Settlement. JA2336 at 5 (Table 2-1). Assuming the claims process here resembles the NFL's disability claims process, about 582 awards will be initially denied, but approved on appeal. If the $1,000 appeal fee deterred only 5% of those appeals,[9] about 29 Class Members would not receive monetary awards that they otherwise would have received under the actuary's calculation. As a result of the Armstrong Objectors' Objection, these

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[8] *See* L. Elaine Halchin, *Former NFL Players: Disabilities, Benefits, and Related Issues*, Congressional Research Service (April 8, 2008), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1530&context=key_workplace (last visited Sept. 1, 2019). From July 1, 1993 to June 26, 2007, 1052 applications for disability benefits were filed. *Id.* Of these applications, 358 were initially approved; another 69 were initially denied but approved on appeal. *Id.* Thus, of the 427 total approvals, 16.2% (69 divided by 427) were approved on appeal.

[9] This is a conservative estimate of the number of Class Members who could not afford the $1,000 appeal fee. For example, after two years of retirement, 78% of former NFL players are under financial stress. *See* Pablo S. Torre, *How (and Why) Athletes Go Broke*, Sports Illustrated (Mar. 23, 2009), http://www.si.com/vault/2009/03/23/105789480/how-and-why-athletes-go-broke (last visited Sept. 1, 2019). Further, 15.7% of players file for bankruptcy after twelve years of retirement. *See* Kyle Carlson et al., *Bankruptcy Rates among NFL Players with Short-Lived Income Spikes*, 105 American Economic Review 5 (April 2, 2015). Indeed, the NFL Player Care Foundation has made charitable grants to 1,406 former players (over 7% of the Class) since 2007. *See* http://www.nflplayercare.com (last visited Sept. 1, 2019).

anticipated denials will be appealed and the awards paid, adding additional value to Class Members of up to $7.65 million.[10]

D. The Armstrong Objectors' efforts also created the Collateral Time Benefit.

Article VI of the Final Settlement (JA5853) provides monetary awards for the Qualifying Diagnoses defined in § 6.3(a). Pursuant to § 6.3(b), *after* the Effective Date of the Final Settlement,[11] Qualifying Diagnoses (other than Death with CTE) may only be made by a Qualified MAF Physician or Qualified BAP Provider approved by Class Counsel and the NFL. *See id.* §§ 2.1(www) (referencing § 6.5(a)) for the Qualified MAF Physician selection process; 2.1(vvv) (referencing § 5.7(a)) for the Qualified BAP Provider selection process.

Conversely, pursuant to § 6.3(c), between the preliminary approval date and the Effective Date, Qualifying Diagnoses (other than Death with CTE) may be made

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[10] Class Counsel's economic expert estimates there will be 3600 monetary awards totaling $950 million over the life of the Final Settlement (JA2336 at 3), or an average of $263,889 per award. The value of 29 additional awards totals over $7.65 million.

[11] Pursuant to Section 2.1(jj) of the Final Settlement, its Effective Date was January 7, 2017, twenty-five days after the date the Supreme Court denied the Armstrong Objectors' petition for *writ of certiorari*. Absent the Armstrong Objectors' appeals, its Effective Date would have been May 23, 2015 (*i.e.*, thirty days after the Final Settlement was finally approved by the Court on April 22, 2015).

by a board-certified neurologist, neurosurgeon, or other neuro-specialist physician chosen by a Class Member.

This is litigation wherein the Class Members and the NFL are adversaries. It arose out of Class Members' distrust of the NFL's billionaire owners who allegedly put profits before safety and defrauded Class Members out of their health and well-being. Just because there is a settlement, however, does not mean that Class Members' distrust of the NFL no longer exists; it is deep-seated and long-standing. It has carried over to the administration of the Final Settlement—especially pertaining to making the Qualifying Diagnoses foundational to Class Members' monetary awards. Whether rightly or wrongly, Class Members fervently believe that they stand a better chance of receiving a Qualified Diagnosis from a physician they choose, rather than one thrust upon them by Class Counsel and the NFL. If for no other reason, there is value in the additional peace of mind they will have for themselves and their families that they did everything possible to enhance their chances of receiving a monetary award under the Final Settlement.

Although the intent of the Armstrong Objectors' appeals was not to extend the time period in which a Class Member could secure a Qualified Diagnosis from a board-certified neuro-specialist physician of his choosing, the fact of the matter is that this collateral benefit was conferred upon Class Members by the Armstrong Objectors' appellate efforts. Appealing the Final Settlement all the way to the

Supreme Court provided Class Members with over nineteen months of additional time to be examined by a board-certified neuro-specialist physician of their own choosing (*i.e.*, from May 23, 2015, the theoretical Effective Date of the Final Settlement with no appeals, through January 7, 2017, the actual Effective Date taking into account the appeals).

In light of the inherent desire to choose one's own doctor and the shortage of board-certified neuro-specialist physicians in the United States,[12] the additional nineteen months to locate one, secure an appointment, and have the examination performed constitutes a Collateral Time Benefit with real value on many levels to Class Members who otherwise would not have had time to do so. Absent the Collateral Time Benefit, there would not have been enough time for even a fraction of the 19,000+ Class Members to complete their examinations in the ten month period between July 7, 2014 (the preliminarily approval date) and May 23, 2015 (the theoretical Effective Date of the Final Settlement with no appeals) absent the Armstrong Objectors' appeal to the Third Circuit and then on to the Supreme Court).

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[12] For example, as of April 2016, there were only 14,268 actively practicing board-certified neurologists in the United States—or a ratio of 1 board-certified neurologist for every 22,708 people in the United States (*i.e.*, 324 million people divided by 14,268 board-certified neurologists). *See* American Board of Psychiatry and Neurology, Inc. Facts and Statistics, https://www.abpn.com/wp-content/uploads/2016/08/ABPN-Total-and-Active-Certifications.pdf (last visited Sept. 1, 2019) (reflecting updated statistics of 14,828 actively practicing board-certified neurologists in the United States as of December 31, 2017).

In their Fee Petition (JA6951 and JA6957), Armstrong Objectors' Counsel stated that the "know of no accurate way to quantify the value of the nineteen-month Collateral Time Benefit and concurrent peace of mind to Class Members," but requested the district court to consider it when determining their fee award. JA6978. The district court, however, failed to do so. The Fee Allocation Order is silent on this point. *See* JA106. The district court erred in failing to consider the Collateral Time Benefit in awarding Armstrong Objectors' Counsel zero attorneys' fees.

II. Armstrong Objectors' Counsel's productive work—up to a $63.65 million increase in the value of the Final Settlement *plus* the Collateral Time Benefit *plus* other valuable benefits they secured—merits their requested fee award.

Objectors "serve as a highly useful vehicle for class members, for the court and for the public generally" to bring adversarial scrutiny to proposed class action settlements. *Great Neck Capital Appreciation Inv. Partnership, LP v. PricewaterhouseCoopers, LLP*, 212 F.R.D. 400, 412 (E.D. Wis. 2002).

Objectors play a valuable role given the awkward dynamic inherent in class action settlements; to wit, a defendant is motivated to settle as cheaply as possible and, as a practical matter, does not care whether its settlement payment primarily benefits the class or class counsel so long as it gets a release; class counsel may have an opportunity to maximize fees at the expense of maximum relief to the class; and the court, of course, must scrutinize the proposed settlement acting in its role as a

fiduciary to the class. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995).

This necessarily imposes an extraordinary burden on the court. As Judge Posner explained, "American judges are accustomed to presiding over adversary proceedings. They expect the clash of the adversaries to generate the information that the judge needs to decide the case." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014). Thus, vigorous, articulate objections by competent counsel acting for individual class members allow a judge to overcome a "disadvantage in evaluating the fairness of the settlement to the class." *Id.*

Objectors who confer a material benefit on a class are entitled to a fee award. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 744 (3d Cir. 2001); *see also* 7B CHARLES A. WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 1803 n.6 (3d ed. 2004).

But even if objectors' appearance only "sharpens the issues and debate on the fairness of the settlement, their performance of the role of devil's advocate warrants a fee award." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 358; *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) (awarding objector fees for "sharpen[ing] debate" in proceeding); *see also Howes v. Atkins*, 668 F. Supp. 1021, 1027 (E.D. Ky. 1987). Even "a lawyer for an objector who raises pertinent questions about the terms or effects, *intended or unintended*, of a proposed

settlement renders an important service." *Great Neck Capital Appreciation Inv. Partnership, LP*, 212 F.R.D. at 413 (emphasis added).

Courts also routinely recognize that even where their efforts do not directly increase the size of the settlement fund, "objectors add value to the class-action settlement process" by "transforming the fairness hearing into a truly adversarial proceeding" and "supplying the Court with both precedent and argument to gauge the reasonableness of the settlement." *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008). Thus, even objections that are "ultimately overruled" may merit a fee award if "the presence of an objector represented by competent counsel transformed the settlement into a truly adversary proceeding." *Frankenstein v. McCrory Corp.,* 425 F. Supp. 762, 767 (S.D.N.Y. 1977).

By their (i) Objection, Amended Objection, and Supplemental Objection, (ii) extensive briefing and argument to the Third Circuit, including organizing appellants' counsels' presentation of the argument, and (iii) extensive briefing to the Supreme Court in support of their petition for writ of *certiorari*, Armstrong Objectors' Counsel performed a valuable service to the Court and Class Members in three ways—*first*, by turning this matter into a true adversarial process, *second*, by substantially enhancing the Final Settlement (up to $63.65 million), and *third*, by delivering the Collateral Time Benefit. In doing so, Armstrong Objectors' Counsel also significantly contributed to the record—a particularly important service here

since the Final Settlement was reached without formal discovery. Notably, Armstrong Objectors' Counsel, not Faneca Objectors' counsel, led the way and went the distance on behalf of the Class Members.

Because "objectors have a valuable and important role to perform in preventing . . . unfavorable settlements, ... they are entitled to an allowance as compensation for attorneys' fees and expenses where ... *the settlement was improved* as a result of their efforts." *In re Cendant Corp. PRIDES Litig.*, 243 F.3d at 743 (emphasis added). Here, there can be no doubt that the Final Settlement was improved by the Armstrong Objectors' Counsel's efforts. Even the Third Circuit recognized the changes made to the Revised Settlement, resulting in the Final Settlement, "benefit[ed] class members." *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d at 423. Indeed, the changes made to the BAP, Death with CTE benefits, and the appeal fee provisions suggested by the Armstrong Objectors added up to $63.65 million of additional value to the Final Settlement. And that's not counting the Collateral Time Benefit and the other benefits Armstrong Objectors' Counsel secured for Class Members.

III. Armstrong Objectors' Counsel's fee request is reasonable.

When the efforts of counsel result in a large recovery for the class, under common-fund principles, an award of a percentage of the benefit conferred is appropriate. *See McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 662 (E.D.

Pa. 2015). The "percentage-of-recovery method is designed to reward attorneys for" "adding value to the class settlement." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 2d 563, 566 (D.N.J. 2003).

The $599,700 straight time hourly fee award requested by Armstrong Objectors' Counsel is imminently reasonable, representing a mere .049% of the total $1.227 billion worth of estimated settlement financial benefits Class Members will receive. And this does not include the value of the Collateral Time Benefit and the other benefits secured for Class Members by Armstrong Objectors' Counsel. The requested fee award is also just .942% of the estimated maximum $63.65 million increase in the value of the Final Settlement.

Courts in this Circuit have granted similar fee requests (as a percentage of the improvement achieved by objectors) in other cases. *See, e.g.*, *Dewey v. Volkswagen of America*, 909 F. Supp.2d 373, 397 (D.N.J. 2012), *aff'd*, 558 Fed. Appx. 191 (3d Cir. 2014) (objectors' counsel awarded "13.4% of the benefit conferred," which was "within the range of acceptable percentages-of-recovery."); *Lan v. Ludrof*, No. 1:06-cv-114, 2008 WL 763763, at *30 (W.D. Pa. 2008) (awarding objector's counsel 25% of the increased settlement value). Armstrong Objectors' Counsel's fee request should be granted here for the same reasons.

IV. The *Gunter/Prudential* factors support Armstrong Objectors' Counsel's fee request.

Armstrong Objectors' Counsel's fee request also is reasonable when viewed through the lens of the *Gunter/Prudential* factors: (1) "the size of the fund created and the number of beneficiaries," (2) "the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel," (3) "the skill and efficiency of the attorneys involved," (4) "the complexity and duration of the litigation," (5) "the risk of nonpayment," (6) "the amount of time devoted to the case by plaintiffs' counsel," (7) "the awards in similar cases," (8) "the value of benefits attributable to the efforts of Class Counsel relative to the efforts of other groups, such as government agencies conducting investigations," (9) "the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained," and (10) "any innovative terms of settlement." *See In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009); *In re Prudential Ins. Co. Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 336 (3d Cir. 1998).

The *Gunter/Prudential* factors are used to evaluate fee requests by both plaintiffs' counsel and objectors' counsel. *See McDonough*, 80 F. Supp. 3d at 660. These factors all weigh in favor of Armstrong Objectors' Counsel fee request.

A. The size of the increase to the settlement fund created by the Armstrong Objectors supports Armstrong Objectors' Counsel's fee request.

The $63.65 million increase in settlement value is a large recovery in its own right. Indeed, for example, it dwarfs the entire $35.5 million settlement in *McDonough. Id.,* 80 F. Supp.3d at 651. Courts routinely award Class Counsel large percentages as attorneys' fees in cases with settlements in the $100 million neighborhood. *See, e.g., In re Ikon Office Sols., Inc.*, 194 F.R.D. at 196-97 (awarding a 30% fee on a $111 million settlement). The magnitude of the additional value conferred by the Armstrong Objectors' efforts—more than an 8.8% increase over the $760-million estimated value of the Revised Settlement—supports the requested fee award. And that does not count the value of the Collateral Time Benefit, enhancing the adversarial process, and improving the record.

B. The number of Class Members benefiting from the Armstrong Objectors' efforts supports Armstrong Objectors' Counsel's fee request.

The Armstrong Objectors' efforts benefit all Class Members. Any eligible Class Member may now receive benefits from the unlimited BAP Fund. Any Class Member may qualify for a waiver of the appeal fee if he or she demonstrates financial hardship. The estates of all Class Members who died between the preliminary approval date and the final approval date benefited from the expanded eligibility period for Death with CTE benefits. And all Class Members desiring to

use the board-certified neuro-specialist physician of their choosing benefited from the nineteen-month Collateral Time Benefit. The number of Class Members benefiting from the Armstrong Objectors' efforts supports the requested fee award.

C. The value of the benefits attributable to the Armstrong Objectors' efforts relative to the efforts of other objectors supports Armstrong Objectors' Counsel's fee request.

The Armstrong Objectors were the driving force behind the noted improvements to the Revised Settlement. The Revised Settlement was the best deal Class Counsel could extract from the NFL on their own. But as a result of the Armstrong Objectors' efforts, the Revised Settlement was enhanced to become the Final Settlement.

The Armstrong Objectors were the first objectors to raise the key issues leading to improvements to the Revised Settlement in the areas of uncapping the BAP Fund, expanding the CTE with Death benefits eligibility period, and eliminating the appeal fee on a showing of financial hardship. The Armstrong Objectors also delivered the Collateral Time Benefit by going the distance and appealing the settlement all the way to the Supreme Court. Other objectors repeated the Armstrong Objectors' arguments or adopted them wholesale. The value of the benefits attributable to the Armstrong Objectors' efforts relative to the efforts of other objectors supports the requested fee award.

D. The complexity and duration of the litigation support Armstrong Objectors' Counsel's fee request.

It is indisputable that this litigation, the Revised Settlement, and the Final Settlement involved complex legal issues—in particular, Rule 23(a)(4) adequacy of representation pertaining to the Death with CTE benefits. *See, e.g.*, the lead role on this issue taken in this Court by Armstrong Objectors' Counsel, Deepak Gupta. Nor did the Armstrong Objectors give up after the Third Circuit issued its opinion, taking their case to the Supreme Court. The complexity and duration of the litigation—including the Armstrong Objectors' key role in it and willingness to go the distance—support the requested fee award.

E. Armstrong Objectors' Counsel's skill, efficiency, and amount of time devoted to the case supports Armstrong Objectors' Counsel's fee request.

Armstrong Objectors' Counsel invested three years and over 1175 billable hours on this litigation working hard to improve—and improving—the Revised Settlement that became the Final Settlement. They litigated the issues with skill and efficiency—as evidenced by their lean attorney team and the modest amount of their straight time hourly fee request with no multiplier and no expense reimbursement (especially when compared to other objectors' fee requests). Armstrong Objectors' Counsel's results speak volumes—additional value up to $63.65 million was obtained for Class Members (not including the value of the Collateral Time Benefit, the benefit of the adversarial challenge to the overall fairness of the Revised

Settlement and Final Settlement, and the improved record they delivered). Their skill, efficiency, and amount of time devoted to the case support the requested fee award.

F. The risk of non-payment supports Armstrong Objectors' Counsel's fee request.

Armstrong Objectors' Counsel's extensive time investment is particularly significant given that counsel accepted the case on a 100% contingency fee basis, advancing all out-of-pocket expenses on behalf of the Armstrong Objectors. The risk of non-payment was high, and, indeed, Armstrong Objectors' Counsel do not seek reimbursement of their litigation expenses. Had the Armstrong Objectors not been successful in improving the Revised Settlement, Armstrong Objectors' Counsel would not have been in line to receive any compensation. *See, e.g., McDonough*, 80 F. Supp.3d at 26. But Armstrong Objectors' Counsel were successful. And they delivered the Collateral Time Benefit, sharpened the debate, and improved the record, too. Armstrong Objectors' Counsel's risk of non-payment supports their requested fee award.

G. Fee awards in similar cases support Armstrong Objectors' Counsel's fee request.

Courts typically award attorneys' fees to objectors' counsel equal to 13-25% of the additional settlement value they obtain. *See, e.g.*, *Dewey*, 909 F. Supp.2d at 397 (awarding 13.4% of the increased settlement value); *Lan*, 2008 WL 763763, at *28 (awarding 25% of the increased settlement value). Here, Armstrong Objectors'

Counsel's straight time hourly rate fee request is only .942% of the $63.65 million increased settlement value (not including the value of the Collateral Time Benefit, the benefit of the adversarial challenge to the overall fairness of the Revised Settlement and Final Settlement, and the improved record they delivered). Fee awards in similar cases, coupled with Armstrong Objectors' Counsel's hard—and fruitful—work improving the Revised Settlement support the requested fee award.

H. The percentage fee that would have been negotiated in a private contingent fee arrangement supports Armstrong Objectors' Counsel's fee request.

Armstrong Objectors' Counsel's straight time hourly rate fee request is only .942% of the $63.65 million increased settlement value they obtained for Class Members (not including the value of the Collateral Time Benefit, the benefit of the adversarial challenge to the overall fairness of the Revised Settlement and Final Settlement, and the improved record they delivered). This amount, on a percentage basis, is far less than contingency fees of 30-40% of a total recovery that are "routinely negotiate[d]" in tort cases like this one. *See, e.g., In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07-MD-01871, 2012 WL 6923367, at *8 (E.D. Pa. Oct. 19, 2012); *Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986); *In re Shell Oil Refinery*, 155 F.R.D. 552, 571 (E.D. La. 1993).

Armstrong Objectors' Counsel's fee request, on a percentage basis, also is substantially less than routine percentage fees in typical contingent fee cases—

including the fee percentage individually represented plaintiffs' attorneys ("IRPAs") will be paid in this litigation. *See* JA 80 (capping IRPAs' contingent fee percentage at 22%).

I. The innovative terms of the settlement improvements secured by the Armstrong Objectors support Armstrong Objectors' Counsel's fee request.

The improvements to the Revised Settlement secured by the Armstrong Objectors are innovative. The improvements did not focus on adding a fixed amount of money to the settlement, but rather, ensured that all Class Members will receive a fair recovery for their injuries.

For example, opening up the BAP Fund ensures that all eligible Class Members will receive the benefits of a baseline examination; to wit, securing an early diagnosis of any issues caused by their injuries and establishing a treatment plan that best addresses the issues. Extending the Death with CTE benefits eligibility period and opening up the appeal process will result in even more Class Members (and their families) receiving a fair recovery. And delivering the Collateral Time Benefit will further ensure each Class Member's recovery (and concurrent peace of mind) by allowing him to use a board-certified neuro-specialist physician of his choice, rather than one assigned by the NFL and Class Counsel.

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Where the *Gunter/Prudential* factors weigh heavily in favor of a fee award—as they do here—courts in this Circuit regularly award attorneys' fees equal to 15-33% of the amount of the total class benefit. *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013) (collecting cases); *In re Linerboard Antitrust Litig.*, No. 98-5055, 2004 WL 1221350, at *14 (E.D. Pa. June 2, 2004) (noting Federal Judicial Center study finding median fee award to be 27-30% and approving 30% fee award after applying *Gunter* factors).

An award of Armstrong Objectors' Counsel's straight time hourly fees, which are but .942% of the up to $63.65 million of additional benefits conferred on Class Members (not including the value of the Collateral Time Benefit, the benefit of the adversarial challenge to the overall fairness of the Revised Settlement and Final Settlement, and the improved record they delivered), would be *substantially below* the lower end of the acceptable fee range. Given the magnitude of the additional settlement benefits secured for Class Members, Armstrong Objectors' Counsel's fee request is more than reasonable.

CONCLUSION

WHEREFORE, the Armstrong Objectors respectfully request this Court to (i) reverse the district court's Fee Allocation Order and award Armstrong Objectors' Counsel attorneys' fees of $599,700 for successfully increasing the value and benefits of the underlying class action settlement for Class Members, or, in the

alternative, (ii) remand this action to the district court with an instruction to reconsider Armstrong Objectors' Counsel's successful efforts at increasing the value of the settlement by virtue of their first-filed objections (as well as the value of the Collateral Time Benefit, the benefit of their adversarial challenge, and the benefit of the improved record they delivered), and re-determine Armstrong Objectors' Counsel's fee award.

In all things, the Armstrong Objectors respectfully request this Court to grand them such other and further relief to which they are justly entitled.

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Respectfully submitted,

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COMBINED CERTIFICATIONS

1. **Bar Membership.** I certify that I am a member of this Court's bar.

2. **Word Count, Typeface, and Type Style.** I certify that this Brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) as the Brief (as indicated by my word processing program, Microsoft Word) contains 10,424 words, excluding those portions of the Brief excluded under Rule 32(a)(7)(B)(iii). I also certify that this brief complies with FED. R. APP. P. 32(a)(5)'s typeface requirements and FED. R. APP. P. 32(a)(6)'s type style requirements as the Brief is presented in 14-point Times New Roman, a proportionally spaced typeface.

3. **Service.** I certify that on September 6, 2019, I caused this Brief to be filed electronically with this Court's CM/ECF system. All participants are registered CM/ECF users and will be served by the Appellate CM/ECF system.

4. **Paper Copies.** I certify that the text of the electronic version of this Brief is identical to the text in the paper copies that will be delivered to the Court.

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September 6, 2019

/s/ Richard L. Coffman
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